

**ORIGINAL**

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of )

Amendment of the Commission's Rules to )  
Establish Part 27, the Wireless )  
Communications Service (WCS) )

GN Docket No. 96-228

To: The Commission

DEC 4 - 1996

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**COMMENTS OF THE RURAL TELECOMMUNICATIONS GROUP**

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December 4, 1996

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## **Comments of the Rural Telecommunications Group**

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## Summary

The proposals announced in the notice of propose rulemaking in this proceeding will delay the introduction of Wireless Communications Service ("WCS") to rural America and effectively foreclose rural telephone companies and other designated entities from participating in the provision of WCS in violation of § 309(j) of the Communications Act of 1934, as amended ("the Act").

Rather than licensing WCS on the basis of large geographic service areas with no build out requirements, the Commission should return to its successful model for cellular service and license two 15 MHz WCS licenses in each geographic area based on MSAs and RSAs. The Commission also should create reasonable build out requirements and fill-in provisions for unserved areas. This approach will ensure that rural populations will have an opportunity to receive WCS and that designated entities will have an opportunity to participate in its provision. Licensing based on small service areas will also support universal service goals, create the most diverse service offering and garner the greatest auction revenues.

In order to satisfy its § 309 obligation, the Commission should award small and very small businesses bidding credits, and rural telephone companies special partitioning rights. The Commission should also award bidding credits to applicants offering discounts to public safety users and schools. Finally, the Commission should consider alternate auction procedures to complete the WCS auction in a swift manner.

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**To: The Commission**

**COMMENTS OF THE RURAL TELECOMMUNICATIONS GROUP**

The Rural Telecommunications Group ("RTG"), by its attorneys and pursuant to § 1.415 of the Commission's rules, hereby respectfully submits these Comments in response to the Notice of Proposed Rule Making ("*NPRM*"), released by the Federal Communications Commission ("FCC" or "Commission") on November 12, 1996, in GN Docket No. 96-228. These Comments represent the concerns of small and rural wireless telecommunications providers interested in participating in the provision of Wireless Communications Service ("WCS").

**I. STATEMENT OF INTEREST**

RTG is a group of concerned rural telephone companies who have joined together to promote the efforts of all rural telephone companies to speed the delivery of new, efficient and innovative telecommunications technologies to the populations of remote and under-served parts of the country. RTG especially advances the interests of rural telephone companies in wireless technologies. RTG's members will be effectively foreclosed from participating in the provision of WCS if the Commission fails to fulfill its obligations under § 309(j) of the Communications Act of 1934, as amended ("the Act"), and adopts the WCS licensing plan proposed in the *NPRM*.

## II. COMMENTS

In its haste to garner revenue, Congress has placed the FCC in an awkward position. The FCC must conduct a WCS auction and collect the proceeds on an expedited basis while taking into account the needs of public safety radio users and encouraging the deployment of WCS to rural areas and the provision of WCS by rural telephone companies and other designated entities. RTG is mindful of the administrative difficulties this will create. The Commission however must not use its tight schedule as a justification for abandoning its obligations under § 309(j) of the Act. The FCC must still ensure that WCS is available to rural populations and that rural telephone companies have a realistic opportunity to provide WCS. The Appropriations Act of 1997<sup>1</sup> does not relieve the Commission of these obligations.<sup>2</sup>

The plan proposed in the *NPRM* completely abandons rural Americans, rural telephone companies and other small businesses. Licensing WCS to a small number of large licensees on the basis of huge geographic service areas, with no special partitioning provisions or installment payment benefits for designated entities, and with no build out requirements violates the Commission's obligations under 309(j)(3)(B) by delaying service to rural areas and denying rural telephone companies an effective opportunity to participate. To

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<sup>1</sup> Omnibus Consolidated Appropriations Act, 1997, P.L. 104-208, Stat. 3009 (1996) ("Appropriations Act of 1997").

<sup>2</sup> The Appropriations Act of 1997 specifically requires the Commission to conduct an auction for this service pursuant to the requirements of 309(j).

remedy this situation, the Commission should modify its WCS licensing plan as discussed herein.

**A. The Commission Should License WCS Based on Small Geographic Service Areas such as MSAs and RSAs.**

In the *NPRM*, the Commission proposes licensing WCS based on large geographic services areas such as Major Trading Areas ("MTAs") or regions. The Commission claims that large service areas, coupled with a flexible allocation policy "will foster the development of the greatest range of new services and technologies...[and] will also permit these services and technologies to be deployed in a rapid and efficient manner to all areas of the nation, including rural areas."<sup>3</sup>

RTG strongly opposes this approach and disputes the Commission's conclusion. The Commission's proposal favors large companies by concentrating spectrum in the hands of a few. Awarding a few WCS licenses may be a "quick fix" for the Commission, but it will have disastrous results for rural America. By licensing only large areas with no build out requirement (discussed *infra*), the Commission will delay service to rural areas and preclude rural telephone company participation in the provision of WCS.

Instead, the Commission should return to its successful cellular model and license WCS based on Metropolitan Statistical Areas ("MSAs") and Rural Service Areas ("RSAs"). The use of MSAs and RSAs ensured the rapid deployment of cellular services to rural areas and afforded rural telephone companies and other small entities a realistic chance to

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<sup>3</sup> *NPRM* at ¶ 15.

participate in the provision of cellular service.

Licensing WCS on the basis of MSAs and RSAs coupled with the Commission's flexible allocation plan will also fulfill universal service objectives. Rural telephone companies can use WCS to provide advanced communications services to schools and to expand their existing services to inaccessible locations. Finally, licensing WCS on the basis of MSAs and RSAs will speed the fill-in process of providing service to unserved areas.

While the use of RSAs and MSAs best satisfies Congress's objectives, the use of Basic Trading Area ("BTA")-like areas<sup>4</sup> is preferable to the use of huge MTAs. Even licensing WCS on the basis of the 172 Commerce Department defined Economic Areas ("EAs") or 175 EA-like areas would be far preferable to the use of MTAs. The Commission reached this conclusion when it determined to license the General Wireless Communications Service ("GWCS") on the basis of EA-like areas rather than MTAs. The Commission reasoned that use of small EA-like geographic areas would "increase opportunities for small businesses and other designated entities to obtain GWCS licenses."<sup>5</sup> The Commission further noted that use of small EA-like areas will "facilitate[e] the provision of wireless GWCS services in rural areas."<sup>6</sup> Finally, the Commission noted that use of EAs would not be "unfair to licensees seeking to provide regional or nationwide services. Those entities will have the opportunity

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<sup>4</sup> While RTG favors BTA-like areas because of their smaller geographic size, as discussed below, RTG opposes the use of any Rand McNally defined area because of the copyright problems related to such use.

<sup>5</sup> *Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use*, Second Report and Order, ET Docket No. 94-32 (rel. Aug 2, 1995) ("*Second R&O*") at ¶ 56. See also, *Second R&O* at ¶ 102.

<sup>6</sup> *Id.*

to aggregate licenses to serve those areas, and we are adopting bidding procedures that should be fair to small and large bidders alike."<sup>7</sup>

For WCS, the Commission now proposes a 180 degree turn from its conclusions in the GWCS *Second R&O*. The Commission offers no explanation for its contrary conclusion perhaps because there is no satisfactory explanation. The fact remains that smaller license areas benefit rural Americans, rural telephone companies and other designated entities. The Commission was correct in its earlier conclusion.

In lieu of adopting small geographic areas, the Commission relies on geographic partitioning as the only means by which rural telephone companies can acquire WCS licenses. As discussed in Section D below, however, geographic partitioning and spectrum disaggregation are poor substitutes for smaller license areas. To date, partitioning has failed miserably to provide realistic opportunities for rural telephone companies to enter new services. Partitioning cannot be relied upon as a means of complying with Congressional intent. An over reliance on partitioning also represents an unacceptable abdication of Commission responsibility. At the extreme, the Commission is heading toward auctioning one nationwide license for each new service and relying on business to "play nice" and include rural telephone companies and other small entities.

In addition to providing rural telephone companies and other designated entities a more realistic opportunity to provide WCS, use of small geographic license areas will promote the broadest range of services. The Commission cannot seriously claim that one or two national licensees will offer as broad a range of services or foster as much technical

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<sup>7</sup> *Id.*



innovation as a multitude of licensees. In the *NPRM*, the Commission is in effect saying, "by letting one or two farmers plant all the fields of the country, we will have more diverse produce than if we let many farmers till the earth." In fact, when harvest time comes we will find we are eating the same vegetable all winter and that there is no cornucopia of produce. Only by increasing the diversity of licensees will the Commission encourage diversity of service and innovation of technology.

Congress recognized the need for diversity when it required the Commission to promote "economic opportunity and competition and [ensure] that new and innovative technologies are readily accessible to the American people by *avoiding excessive concentration of licenses* and by *disseminating licenses among a wide variety of applicants*."<sup>8</sup> The Commission also recognized this in the *Second R&O* when it expressed concern over providing small enough service areas to deploy "niche" services, or services aimed at rural or relatively rural areas.<sup>9</sup>

The U.S. Treasury will also benefit from more numerous markets. Experience with auctions demonstrates that licenses based on smaller areas sell for a greater price per population than licenses based on large areas. For example, in the auctions of Personal Communications Service ("PCS") licenses, the smaller C block auction (30 MHz based on BTAs) raised more revenue than the larger A and B block auction (60 MHz based on MTAs)

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<sup>8</sup> 47 U.S.C § 309(j)(B)(3) (emphasis added).

<sup>9</sup> *Second R&O* at ¶ 51.

even after the cost of bidding credits was deducted.<sup>10</sup> Far fewer entities can compete for large areas, exerting less upward pressure on prices and creating a greater likelihood of collusion or tacit agreements among bidders.

The Commission should not under any circumstances use Rand McNally defined geographic areas. As the Commission has noted, Rand McNally owns the copyright to its MTA and BTA listings forcing Commission licensees to negotiate agreements with and pay royalties to Rand McNally. Such restriction is unnecessarily burdensome, especially to rural telephone companies and other small entities, is easily avoidable, represents an abdication of responsibility by the Commission, and an unearned windfall to Rand McNally. In the *Second R&O*, the Commission reasoned that the use of EAs also "avoid[s] the copyright problems and issues associated with MTAs."<sup>11</sup> In the event that the Commission does not license WCS based on MSAs and RSAs, the Commission should either create its own license areas, by grouping MSAs and RSAs, or it should license WCS based on EAs or EA-like areas.

Finally, while RTG is sensitive to the statutory deadline imposed by the Appropriations Act of 1997, it is arbitrary and capricious for the Commission to state that it will not even consider licensing more than 306 WCS licenses<sup>12</sup> without first examining the adverse impact on rural populations and the possibility of using alternate auction procedures.

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<sup>10</sup> In the A and B PCS blocks, the Commission auctioned two 30 MHz blocks of spectrum in each MTA. The auction raised \$7,736,020,384 which is equivalent to \$15.32 per pop or \$.51 per MHz/pop. The C block auction, which the Commission based on the smaller BTAs, netted \$10,071,708,841.50 before the reauction, which is equivalent to \$39.80 per pop or \$1.33 per MHz/pop.

<sup>11</sup> *Second R&O* at ¶ 56.

<sup>12</sup> See, *NPRM* at n. 27 (FCC will not consider auctioning more than 306 licenses).

**B. The Commission Should Auction Two 15 MHz Blocks of Spectrum Not Subject to a Spectrum Cap in Each Geographic Area.**

The Commission seeks comment on whether competitive bidding should determine the amount and location of spectrum for each license, for example, dividing the 30 MHz into six 5 MHz blocks and allowing bidders to compete for all or a part of the 30 MHz total. While this approach is creative, the Commission should not adopt it for three reasons. First, it would create too much uncertainty and disruption of business plans. Second, the Commission can achieve the same goals (efficient distribution of spectrum and services) without uncertainty, by carefully negotiated spectrum disaggregation. Third, such a plan would complicate and prolong the auction process.

Under the proposed plan, companies would face difficulty acquiring the large blocks of spectrum (*e.g.*, 25 or 30 MHz) necessary to provide two-way digital network services. A few bidders could ransom 5 or 10 MHz, disrupting the service and discouraging bona fide bidders. If a bidder's business plan required 20 MHz and the bidder only acquired 15 MHz it would either be forced to withdraw its bids for the 15 MHz, provide different services, or default on its winning payments. Such uncertainty should be avoided.

Instead, the FCC should assign the spectrum in two 15 MHz blocks. This will minimize the total number of licenses, allow bidders to formulate definitive business plans and still allow bidders to realistically pursue one consolidated block of 30 MHz should they so desire. Such an approach is also more consistent with the services likely to be provided as WCS which are likely to require larger blocks of spectrum.

If the FCC intends to arbitrarily limit the total number of WCS licenses for auction, then for the reasons explained above, the Commission should favor more numerous markets --

based on small areas -- to more numerous frequency blocks. If the Commission really intends to let the market decide what services are offered and where, then it must be willing to go the entire distance and structure the auction to license the maximum number of spectrum blocks in the maximum number of markets.

The Commission should not impose a spectrum cap on WCS nor should WCS spectrum count against the 45 MHz CMRS spectrum cap. While WCS offerings will likely compete with other CMRS offerings, the imminent introduction of six PCS providers in each market and the introduction or expansion of numerous other wireless services such as Enhanced Specialized Mobile Radio Service ("ESMR") will create sufficient competition so that no one licensee will be able to exert undue influence on the CMRS market.

**C. The Commission Must Adopt Measures to Encourage Participation by Designated Entities in the WCS Auctions.**

Thus far, the Commission has failed miserably in the auction process to ensure that rural telephone companies and other designated entities receive an opportunity to provide new and innovative communications services.<sup>13</sup> As discussed above, the best way to promote participation is to award many WCS licenses based on small geographic areas. In the *NPRM*, the Commission tentatively rejected this concept in the interest of time. Rather than sacrifice the interests of citizens in rural areas however, the FCC should adopt expedited

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<sup>13</sup> For example, a mere three rural telephone companies won C block PCS licenses. See e.g., Comments of Century Personal Access Network, Inc., at 9 in *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees; Implementation of Section 257 of the Communications Act — Elimination of Market Entry Barriers*, WT Docket No. 96-148 and GN Docket No. 96-113.

auction procedures to allow the swift licensing of multiple markets.

In the *Competitive Bidding Second R&O*,<sup>14</sup> the Commission noted that it would tailor the design of each auction to promote the policy objectives identified by Congress. For WCS, in addition to promoting the interests of designated entities and public safety users, an explicit goal of Congress is speed. Therefore, for WCS, the Commission could best meet these goals by using an auction technique that allows for the swift conclusion of the auction. The current simultaneous multiple round electronic bidding may take too long. When confronted with the requirement to conduct an auction swiftly, the FCC need not rely on its existing lengthy auction rules. For example, in an expedited auction, a market could close when there have been no new high bids in that market for twelve rounds. The Commission could then collect and deposit the revenue for that market even before the entire auction is over. The point is, the FCC does not have to use a slow technique that will require the auctioning of large geographic license areas.

In addition to expedited auction procedures, the FCC should create special provisions to benefit designated entities. The Commission itself correctly concluded that installment payments are more effective than bidding credits in attracting capital and enhancing the opportunities and ability of small business to participate in successful spectrum auctions.<sup>15</sup> The FCC, however, tentatively concluded that installment payments could not be used for

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<sup>14</sup> *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, Second Report and Order, PP Docket No. 93-253, 9 FCC Rcd 2348 (1994), *recon.*, Second Memorandum Opinion and Order, 9 FCC Rcd 7245 (1994) ("*Competitive Bidding Second R&O*").

<sup>15</sup> *Second R&O* at ¶ 95.

WCS because of the Appropriations Act of 1997 deadline.<sup>16</sup> Therefore, for WCS, the Commission should award generous bidding credits for designated entities. Specifically, the Commission should award a 15% bidding credit to small businesses and a 25% bidding credit for very small businesses as those entities are defined for the PCS F block auction.<sup>17</sup> In addition, as discussed below, the Commission should allow rural telephone companies favorable partitioning rights.

The Commission should award a 10% bidding credit, in addition to any other bidding credit, to any bidder who certifies that it will provide commercial services to public safety communications users for a reduced fee (*i.e.*, a 50% discount off the commercial rate). Additionally, RTG advocates encouraging the provision of similar discounts to schools, especially schools in rural areas, to help ensure that students have access to advanced telecommunication services. Accordingly, the Commission should also award a 10% bidding credit to applicants proposing similar discounted rates to schools.

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<sup>16</sup> *NPRM* at ¶ 63.

<sup>17</sup> Section 24.720 of the Commission's Rules defines a small business and a very small business as entities that, together with their affiliates and persons or entities that hold interests in such entities and their affiliates, have average annual gross revenues that are not more than \$40 (small business) and \$15 million (very small business), for the preceding three years. In the *Second R&O* the Commission determined that a 10% bidding credit in the GWCS auctions was appropriate for small businesses because the Commission: (1) licensed the service based on smaller EAs; (2) allowed installment payments; and, (3) allowed interest only payments. *Second R&O* at ¶ 100. As discussed above, circumstances for WCS warrant more generous credit.

**D. The Commission Must Allow Rural Telephone Companies A Right of First Refusal to Partition a Geographic Area or Acquire Disaggregated Spectrum.**

The Commission treats partitioning and spectrum disaggregation as magic panaceas for its neglect of designated entities. RTG applauds the Commission for allowing partitioning and disaggregation and the flexibility they afford. In practice, however, partitioning and spectrum disaggregation have not provided substantial opportunities for designated entities to engage in the provision of new technologies and services. Since licensees are extremely reluctant to cede a part of their license, RTG's members have found winning licensees' interest in negotiating PCS partitioning or disaggregation agreements luke warm at best. Likewise, auction winners in the Multipoint Distribution Service (MDS) have refused to negotiate partitioning arrangements.

In addition, since the Commission proposes allowing any entity to acquire a partitioned license or disaggregated spectrum, designated entities must compete with all comers for partitioning or disaggregation rights and partitioning and disaggregation are therefore of no special "benefit" to rural telephone companies or other designated entities. A benefit conferred on all entities does not benefit any one over another and as a result cannot be viewed as satisfying Congress's § 309(j) mandate.

Before concluding that geographic partitioning and spectrum disaggregation in fact create realistic opportunities for rural telephone companies and other small businesses, the Commission should carefully examine its records to make a specific finding that designated entities have in fact acquired partitioned or disaggregated licenses for new services. Absent such explicit finding based on fact, the Commission should cease its incorrect reliance on partitioning and disaggregation (open to all entities) as the only entries for designated entities

who are otherwise effectively foreclosed from providing new services by the auction process.

Congress recognized the commitment of rural telephone companies to serve the needs of rural subscribers and directed the Commission to give rural telephone companies distinct consideration. To satisfy this obligation, the Commission must provide some meaningful preference to rural telephone companies.

In order to make partitioning and disaggregation a meaningful benefit to rural telephone companies, the Commission must allow rural telephone companies a right of first refusal to partition an area reasonably related to their wireline service area (*e.g.*, five times the population of the telephone service area) and to acquire disaggregated spectrum in this area. As part of the preauction procedure, rural telephone companies could file a request for partitioning/disaggregation (identifying the amount of spectrum or geographic area the rural telephone company desires to acquire) with their Form 175. Bidders would then be on notice which markets would be subject to a right of first refusal. Such notice might even drive up the cost of such markets since bidders would know of additional sources of capital. This right will also speed WCS to the rural public because rural telephone companies can introduce new services more quickly than new entrants in their wireline service areas.<sup>18</sup>

While partitioning and spectrum disaggregation are not cure-alls, they are useful tools for efficiently providing diverse services. The Commission should allow partitioning based on any geographic area the licensee and partitionee negotiate. Forcing licensees to partition

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<sup>18</sup> Compare the service initiation dates of the A and B cellular licensees. Predictably, the A side licensees commenced service 18-24 months after the B side licensees began serving rural populations. The quick roll-out of cellular services in rural markets and recent construction of wireless cable systems to provide video to rural America evidence rural telephone companies' commitment to providing new services quickly.



along arbitrary boundaries such as county lines, distorts market forces and unduly harms small partitionees and curbs the development of niche services. Similarly, the Commission should allow spectrum disaggregation in any amount. Requiring a licensee to disaggregate a minimum of one megahertz of spectrum may lead to waste or inefficient use of the spectrum.

In the unfortunate event that the Commission licenses WCS on a national or regional basis, the Commission should not limit partitioning to large geographic areas such as MTAs. Such an abhorrent limitation would violate the provisions of 309(j) by denying service to rural areas. RTG adamantly opposes such an inappropriate limitation.

**E. The Commission Should Allow Licenses to Franchise WCS Spectrum and Service Area.**

RTG strongly supports the Commission's proposal that a licensee be allowed to "franchise" part of its geographic service area or a portion of spectrum while still maintaining ultimate responsibility for the license. Many licensees have been reluctant to partition part of their service area since it requires relinquishing the license to that area. These licensees will be more likely to franchise areas and spectrum for a term of years. Since the licensee will maintain ultimate responsibility for the license, there is no reason for the Commission to regulate or intercede in such franchise agreements in any way.

While the franchise proposal is a good one, licensees should not be limited to a particular type of agreement. Licensees also should be able to effectively "franchise" an area or band of spectrum through management and operating agreements or any other agreement by which a third party provides a service under the umbrella of the license. The crucial factor is that the licensee is ultimately responsible for the license and subject to Commission

regulation.

Such flexibility will promote the broadest array of services and the most efficient use of spectrum while also encouraging participation by rural telephone companies and other small business. An unlimited "franchise" plan will also encourage small providers to serve rural areas.

**F. The Commission Should Adopt Performance Requirements If It Adopts Large License Areas.**

The Commission proposes no build out requirements for large WCS geographic license areas (*i.e.*, nationwide, MTAs, EAs and BTAs). There could be no better way to delay WCS to rural America or deny rural telephone companies an opportunity to provide WCS. Without some incentive to use it or lose it, large WCS licensees will simply leave rural spectrum fallow.

Therefore, if the Commission licenses WCS on the basis of large areas, the Commission must balance these areas with performance requirements similar to its successful cellular build out requirements. If a licensee does not provide service to an area within five years of the license grant or file a plan with the Commission evidencing its coverage area for years 5-10, the licensee must relinquish rights to such unserved areas. New entities can then fill-in service under rules similar to the cellular fill-in rules.<sup>19</sup> Such requirements will encourage licensees to partition or franchise regions of their service areas that they do not intend to serve and prevent them from holding rural areas captive.

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<sup>19</sup> See 47 C.F.R. §§ 22.949-22.953.

In structuring performance standards the Commission should use geographic rather than population based benchmarks. A licensee can satisfy population benchmarks merely by serving densely populated urban areas, leaving rural areas forgotten.

While there may be a small danger that performance requirements may lead to some distortions in market decisions, the benefits build out rules confer on rural areas and rural providers far outweigh the danger. If a licensee has a long term plan that differs from short term performance requirements, that licensee can always franchise the area to a rural telecommunications provider to provide immediate service. In addition, the Commission's flexible allocation plan ensures that spectrum will be used in an efficient manner for its best use.

Smaller license service areas mitigate the need for performance requirements since there is less danger that licensees will not serve large areas of the country. If the Commission is genuinely concerned that build out requirements lead to business decisions not based on market factors, causing distortion in service, the Commission should license WCS on the basis of small geographic areas.

### III. CONCLUSION

The Commission's current proposal: large license areas, few licensees, no performance requirements, open partitioning, no installment payments and no provisions for rural telephone companies is a prescription for disaster for rural populations and a violation of § 309(j) of the Act. The FCC's plan will effectively deny rural America the benefits of WCS for years to come and deny rural telephone companies an opportunity to participate in the provision of WCS.

Accordingly, RTG respectfully urges the Commission to adopt the recommendations proposed herein.

Respectfully submitted,

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December 4, 1996

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